

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Minority Television Project, Inc.)	EB-03-IH-0126
)	NAL/Account No. 200532080019
)	Facility ID No. 43095
Licensee of Noncommercial Educational)	FRN 0008886293
Television Station KMTP-TV, San Francisco,)	
California)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: 02/08/2005**Released: 02/09/2005**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"), we find that Minority Television Project, Inc. ("Minority"), licensee of noncommercial educational television Station KMTP-TV, San Francisco, California, has apparently violated section 399B of the Communications Act of 1934, as amended (the "Act"),¹ and section 73.621 of the Commission's rules,² by willfully and repeatedly broadcasting prohibited advertisements. Based upon our review of the facts and circumstances of this case, we conclude that Minority is apparently liable for a monetary forfeiture in the amount of \$7,500.

II. BACKGROUND

2. This case arises from allegations contained in a reply pleading filed with the Commission by Lincoln Broadcasting Company ("Lincoln") on April 17, 2002, during the course of a prior investigation by the Enforcement Bureau (the "Bureau") concerning Station KMTP-TV's underwriting practices.³ In that pleading, Lincoln alleged that Minority had broadcast prohibited underwriting announcements on behalf of the Honda Accord, Charles Schwab, and Star Cruises, on January 9, February 25, and March 26, 2002, respectively.⁴ The Bureau thereafter inquired of the licensee concerning the new announcements.⁵ Minority responded,

¹ See 47 U.S.C. § 399b.

² See 47 C.F.R. § 73.621.

³ See Reply of Lincoln Broadcasting Company, in File Nos. EB 00-IH-0153 and 01-IH-0652, dated April 17, 2002 ("April 17th Reply").

⁴ *Id.*

⁵ See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Minority Television Project, Inc., dated July 11, 2003 ("July 11th LOP").

acknowledging that Station KMTP-TV aired the announcements in question during the period January through March 2002 a total of 98 times, and defended its underwriting practices.⁶

III. DISCUSSION

3. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁷ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁸ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule. As described in greater detail below, we conclude under this procedure that Minority is apparently liable for a forfeiture in the amount of \$7,500 for its apparent willful and repeated violations of section 399B of the Act and section 73.621 of the Commission's rules.

A. Minority Apparently Has Willfully and Repeatedly Broadcast Advertisements in Violation of Section 399B of the Act and Section 73.621 of the Commission's Rules

4. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit

⁶ See Letter from Minority Television Project, Inc. to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, dated August 19, 2003 ("August 19th Response"); see also Reply of Lincoln Broadcasting Company, dated October 31, 2003 ("October 31st Reply"); Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Minority Television Project, Inc., dated July 14, 2004 ("July 14th LOP"); Letter from Minority Television Project, Inc. to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated July 28, 2004 ("July 28th Response"); Reply of Lincoln Broadcasting Company, dated August 12, 2004 ("August 12th Reply"); Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Minority Television Project, Inc., dated August 24, 2004 ("August 24th LOP"); Letter from Minority Television Project, Inc. to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated August 31, 2004 ("August 31st Response"); Reply of Lincoln Broadcasting Company, dated September 15, 2004 ("September 15th Reply").

⁷ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362 ¶ 9.

⁸ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

entities.⁹ The pertinent statute specifically provides that noncommercial educational stations may not broadcast advertisements.¹⁰ Although contributors of funds to noncommercial stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or business.¹¹ Specifically, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.¹² At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, the Commission expects only that licensees exercise reasonable, good-faith judgment in this area.¹³

5. At issue are three underwriting announcements which Minority acknowledges that the station broadcast a total of 98 times during the period January through March 2002.¹⁴ The announcements for the Honda Accord and Charles Schwab were televised in Mandarin Chinese and that on behalf of Star Cruises was aired in the Vietnamese language. The translations offered by Lincoln and Minority are substantially similar. To the extent that the translations offered by Minority represent its attempt to exercise its "good-faith" discretion under *Xavier, supra*, we will defer to it. Accordingly, we will accept and rely on Minority's translations in evaluating whether it acted reasonably in its exercise of that discretion.¹⁵

6. In this case, Minority acknowledges that it aired the subject messages on behalf of the station's underwriters, all of which are for-profit entities, 98 times.¹⁶ Minority argues, however, that its broadcast of the announcements was consistent with pertinent Commission precedent.¹⁷

7. In this regard, Minority represents that, as specifically permitted by section 73.621 of the Commission's rules, it received only "general contribution[s] made] to the station's operating cost" from World Channel, Inc., a program supplier, and that such contributions to the station were not made in *quid pro quo* exchange for the broadcast inclusion of individual announcements, including those made on behalf of the Honda Accord and Charles Schwab, but, rather, to offset the station's general operating costs.¹⁸ Minority avers that it has not received

⁹ 47 U.S.C. § 399b(a).

¹⁰ *Id.*

¹¹ *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice (1986), *republished*, 7 FCC Rcd 827 (1992) ("*Public Notice*").

¹² *Id.*

¹³ *See Xavier University*, Letter of Admonition, issued November 14, 1989 (Mass Med. Bur.), *recon. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990).

¹⁴ *See August 19th Response* at Attachment A.

¹⁵ The "good-faith" standard for licensee discretion is set forth by the Commission in *Xavier, supra*.

¹⁶ *August 19th Response* at 2-4.

¹⁷ *Id.* Minority does acknowledge, however, that the announcement for Star Cruises included the expression "please call." *Id.* at 5.

¹⁸ *Id.* at 6.

consideration directly from the underwriters themselves, or compensation on a per-spot basis for airing underwriting announcements, since contracting with program supplier World Channel, Inc., in December 1998.¹⁹ Minority claims that, since that time, it has received only general annual station operating contributions to subsidize the cost of airing the programs that World Channel supplies.²⁰ Although Lincoln argues that Minority's explanation is at odds with the account given in the prior forfeiture proceeding, *viz.*, that Minority "received cash consideration for each of the announcements" then under investigation, it appears that Minority may simply have been imprecise in previously explaining how it received such payments.²¹

8. Regarding the third underwriting announcement, Minority represents that it had an "oral barter or trade arrangement" with another program supplier, Tron Do, in exchange for Minority's agreement to broadcast Mr. Do's program, "Dien Dan Vietnam," on which program the Star Cruises messages were contained.²² Minority contends that Station KMTP-TV's broadcast of the underwriting announcements thus do not violate section 399B of the Act, even if the messages contained language or references that promoted for-profit entities, because they were not aired in exchange for consideration.

9. We reject Minority's arguments, and find that each of the announcements at issue apparently exceeds the scope of what is permissible under section 399B of the Act, and the Commission's pertinent rules, in light of the "good faith" discretion afforded licensees under *Xavier, supra*. In this regard, the announcements each seek impermissibly to distinguish favorably their underwriters from competitors by directly stating or implying that they offer superior service or products, and some of the announcements also invite or urge business patronage.

10. With regard to the Honda Accord announcement, we note that the visual aspects of the announcement depict the automobile in use, turning a circle, while the narrator, speaking in Chinese, describes several of the vehicle's attributes through the terms "accuracy," "flexibility," "power" and "level," suggesting that such qualities commend it as a vehicle that will accompany viewers "around the direction of [their] life, straight or curve."²³ Minority argues that, because these adjectives are not usually applied to describe automotive performance, and are "factually descriptive," they should not be deemed to be promotional. This argument lacks merit. As we have said previously, the purported factual descriptiveness or veracity of any reference is

¹⁹ *August 31st Response* at 2.

²⁰ *Id.* at 2, n. 2.

²¹ See Letter of Minority Broadcast Television Project, Inc., to Charles W. Kelley, Chief, Investigations and Hearings Division, dated December 20, 2001, in Enforcement Bureau proceedings numbered EB-00-IH-0153 and EB-01-IH-0652 ("*December 20th Response*"), at 2; see also *September 15th Reply* at 6-9. For the reasons set forth, *infra*, we find that Minority made the announcements at issue in exchange for consideration. The manner in which the licensee received such payments from its program suppliers and underwriters, whether annually in a lump-sum, or on a per-spot basis, is of no consequence to our analysis.

²² See *August 19th Response* at 6-7.

²³ *Id.* at 3.

irrelevant to the issue of whether that message is promotional.²⁴ Moreover, we find that these terms are clearly promotional. Although the term “accuracy” does not appear to refer to a quality ordinarily associated with automobiles, the same cannot be said for the other adjectives contained in the announcement. In this regard, the term “flexibility” appears to imply that the car possesses varied functionality, which, in this case, intends a comparative and qualitative reference. It further appears that the term “power,” in this case, speaks to the vehicle’s acceleration, torque or horsepower rating, which is similarly descriptive and pertinent to automotive quality. Moreover, the announcement’s reference to the term “level” reasonably suggests, in the context presented, that the Honda Accord automobile’s drivers enjoy a smooth ride, which is a favorable reference to the product’s handling characteristics.

11. Minority further contends that the Honda Accord announcement is not promotional because the automobile is portrayed being driven in a pattern that spells the Chinese character for the word “life,” and not “racing down a roadway.”²⁵ Minority claims that the instant presentation is therefore allegorical or symbolic and does not promote the featured product’s automotive qualities.²⁶ We note that Minority cites no precedent supporting this contention. To the contrary, even where underwriting announcements utilize indirect or oblique forms of expression to convey their message, they may still be found to promote their subjects.²⁷ We find that the instant announcement portrays the vehicle as one that would enhance or enrich the viewers’ lifestyles, and by doing so, impermissibly promotes the underwriter’s product.

12. We find that the Charles Schwab announcement promotes the company by inviting business patronage. In this regard, the message implores viewers to consider that “new tax laws are affecting different kinds of IRA retirement accounts,” and then invites them to ask the advisers at Charles Schwab for specific advice on how best to respond to such changes.²⁸ Similarly, the Star Cruises announcement describes its Hoi Ngo Trung Duong vacation package in comparative and qualitative terms by stating that it is “an interesting tour that has received many compliments,” thus attempting to distinguish it favorably from other such tours.²⁹ The announcement also characterizes the cruise ship’s accommodations as “world class,” and not in permissible value-neutral terms. Furthermore, the announcement makes a prohibited call-to-action through inviting viewers to “please call,” and by implying that, because “seats are limited,” that they should act promptly to secure a reservation.³⁰

²⁴ See, e.g., *Minority Television Project, Inc. (KMTP-TV)*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 15646 (Enf. Bur. 2002), Forfeiture Order, 18 FCC Rcd 26611 (2003), *application for review denied*, Order on Review, ___ FCC Rcd ___ FCC 04-293 (rel. Dec. 23, 2004), *recon. pending, citing Tri-State Inspirational Broadcasting Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 16800 (Enf. Bur. 2001); *Penfold Communications, Inc.*, *supra*.

²⁵ *August 19th Response* at 3.

²⁶ *Id.*

²⁷ See, e.g., *Minority Television Project, Inc. (KMTP-TV)*, *supra*, 17 FCC Rcd 15646, 15653 at ¶ 21, *citing Board of Education of New York (WNYE-TV)*, 7 FCC Rcd 6864, 6865 (Mass Media Bur. 1992).

²⁸ *August 19th Response* at 4 and Attachment C-1.

²⁹ *Id.* at Attachment D.

³⁰ *Id.*

13. Contrary to Minority's contentions, the underwriting announcements at issue appear to have been broadcast in exchange for consideration. In this regard, "consideration," for purposes of section 399B of the Act, may consist of the program material itself.³¹ The Act does not require that the consideration involved be supplied directly by the sponsor or underwriter itself.³² Furthermore, the Commission has long held that promotional statements made on behalf of for-profit entities, when made in exchange for the receipt or reasonable anticipation of direct or indirect consideration, are prohibited under section 399B, and that cognizable consideration may take many forms.³³ Thus, even if the program supplier, World Channel, Inc., negotiated with the advertising firms or underwriters involved and received payments directly from them, that factor would be of no consequence, because Minority's decision to include the announcements in the material that it broadcast appears based on the fact that it, in turn, was to receive consideration from the programmer, if not on a "per spot" basis, then in the form of annual payments.³⁴ The production orders and invoices supplied by Minority indicate that its program supplier World Channel, Inc., billed advertising firm Monva, Inc., for placing the Honda Accord and Charles Schwab announcements in program material intended for broadcast over the station.³⁵ The invoices contemplate that the station would run the announcements on specific dates in exchange for payment, and belie any claim that the announcements were aired on a gratuitous basis. In addition, the inclusion of the Star Cruise announcement in the programming supplied to the station was, according to Minority, based on "oral barter or trade arrangement" and thus supported by consideration.³⁶

B. Proposed Action

14. Section 503(b) of the Act and section 1.80(a) of the Commission's rules both state that any person who willfully or repeatedly fails to comply with the provisions of the Act,

³¹ See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, Report and Order, 90 FCC 2d 895 (1982), *recon.*, 97 FCC 2d 255 (1984) ("1982 Policy Statement"); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Report and Order, 86 FCC 2d 141, 148 (1981) (consideration is broadly construed and may be deemed to include general contributions made to licensees) ("Second Report and Order").

³² 47 U.S.C. § 399b(a)(1) specifically provides: "for purposes of this section, the term 'advertisement' means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended to promote any service, facility or product offered by any person who is engaged in such offering for profit."

³³ 1982 Policy Statement, 90 FCC 2d at 911-12, ¶¶ 26-28.

³⁴ August 19th Response at Attachments B-2, B-3; C-2, C-3; July 28th Response at Attachments B-2, B-3; C-2, C-3.

³⁵ *Id.* In similar cases, the Commission has rejected arguments that such payments constituted general station contributions unrelated to the broadcast of underwriting announcements made on behalf of the donors involved. See, e.g., *Penfold Communications, Inc.*, *supra*.

³⁶ See August 19th Response at 6-7.

the rules or Commission orders shall be liable for a forfeiture penalty.³⁷ The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$2,000 for violation of the enhanced underwriting requirements.³⁸ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁹

15. In this case, it appears that, during the period January through March 2002, Minority willfully and repeatedly broadcast advertisements in violation of section 399B of the Act and section 73.621 of the Commission's rules. We believe that a substantial forfeiture is necessary due to several factors, including the period of time during which the prohibited announcements were aired -- three months -- and the significant number of times that the announcements were repeated -- 98. Nevertheless, we believe the potential liability if we simply applied the \$2,000 base amount to each of the 98 apparent violations would be excessive here. Based on all the circumstances and after examining forfeiture actions in other recent underwriting cases, we believe that a proposed forfeiture of \$7,500 is appropriate here.⁴⁰

16. Accordingly, applying the *Forfeiture Policy Statement* and the statutory factors to this case, we conclude that Minority is apparently liable for a forfeiture in the amount of \$7,500, for violating the Commission's underwriting rules. We will not hesitate to take even stronger enforcement action against noncommercial educational licensees that engage in similarly serious violations of our underwriting requirements.

IV. ORDERING CLAUSES

17. In view of the foregoing, we conclude that a monetary sanction is appropriate. Accordingly, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.311 and 1.80 of the Commission's rules, Minority Television Project, Inc., licensee of noncommercial educational station KMTP-TV, San Francisco, California, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$7,500 for willfully and repeatedly broadcasting advertisements in violation of section 399B of the Act, 47 U.S.C. § 399b, and section 73.621 of the Commission's rules, 47 C.F.R. § 73.621.

18. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Minority SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

³⁷ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

³⁸ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

³⁹ 47 U.S.C. § 503(b)(2)(D). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 ¶ 27.

⁴⁰ See, e.g., *Christian Voice of Central Ohio, Inc. (WCVZ(FM))*, 19 FCC Rcd 23663 (Enf. Bur. 2004) (\$20,000 forfeiture proposed for underwriting violations), *response pending*; *Minority Television Project, Inc. (KMTP-TV)*, *supra* (\$10,000 forfeiture imposed for underwriting violations).

19. Payment of the forfeiture must be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL Acct. No. and FRN referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, Illinois 60601. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

20. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

21. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

22. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁴¹

23. IT IS ALSO ORDERED that the complaint filed by Lincoln Broadcasting Company IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED, and the complaint proceeding IS HEREBY TERMINATED.⁴²

24. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Minority Television Project, Inc., c/o its attorney, James L. Winston, Esq., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Sixth Floor, 1155 Connecticut Avenue, N.W., Washington, D.C. 20036, and by regular mail to Lincoln Broadcasting Company, c/o its attorney, Michael D. Berg, Esq., Law Offices of Michael D. Berg, 1730 Rhode Island Avenue, N.W., Suite 200, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁴¹ See 47 C.F.R. § 1.1914.

⁴²For purposes of the forfeiture proceeding initiated by this NAL, Minority Television Project, Inc. shall be the only party to this proceeding.